*HON'BLE SRI JUSTICE BILAL NAZKI
HON'BLE SRI JUSTICE P.S. NARAYANA

+W.P.No.31 of 2004

%29-06-2004

M/s.National Mineral Development
Corporation rep.by its
Deputy Manager (Commercial)

..... Petitioner

VERSUS

$The commercial Tax Officer
and others

.....RESPONDENT

< GIST:

> HEAD NOTE:

! Counsel for petitioner : Mr.S.Krishna Murthy

^ Counsel for Respondents: G.P. for Commercial Taxes

? Cases referred

1. ILR 1972 A.P. 719 = 1970 APHN 357
2. (2000) 6 SCC 359
3. AIR 1975 S.C. 1185
4. AIR 1970 S.C. 1 = (1969) 2 SCC 74
5. AIR 1958 S.C. 868 = 1958(34) ITR 150
6. AIR 1967 S.C. 681 = 1967(19) STC 144
7. AIR 1974 S.C. 1380 = 1974(2) SCC 453

8. AIR 1990 S.C. 10 = 1989(4) SCC 582
9. 2003(12) ILD 342

THE HON'BLE SRI JUSTICE BILAL NAZKI
&
THE HON'BLE SRI JUSTICE P.S. NARAYANA

W.P.No.31 of 2004

ORDER**:-** **(per P.S.Narayana.,J)**

Heard Sri S.Krishna Murthy, the learned Counsel representing the writ petitioner and the learned Government Pleader for Commercial Taxes.

M/s.National Mineral Development Corporation Limited, Hyderabad filed the present Writ Petition praying for a writ of certiorari after calling for the records and quash the assessment order passed by 1st respondent, Commercial Tax Officer, Agapura Circle, Hyderabad in G.I.R.No.10396/92-93 (ST) dated 18-10-2002 and order refund of the amount of Rs.88,166/- paid by the writ petitioner for the above assessment order and for such other suitable orders. The writ petitioner is a Public Limited Company engaged in the business of excavation and export of minerals and is an assessee on the rolls of the 1st respondent. The 1st respondent by his

proceedings dated 20-10-1999 in Rc.No.1396/99-2000 had made an assessment under the Central Sales Tax Act, hereinafter referred to as "Act" for the purpose of convenience for the Assessment Year 1992-93 on a gross turn-over of Rs.12,06,07,766/- and Rs.11,98,49,711/- respectively and raised a demand of Rs.1,18,53,634/- and the same was questioned by way of W.P.No.22434/99 and the said Writ Petition was allowed on 27-12-1999. The 1st respondent by his proceedings dated 18-10-2002 in G.I.R.No.10396/92-93 (CST) made a fresh assessment on gross and net turnovers of Rs.29,78,766/- and Rs.22,20,711/- to a tax of Rs.90,734/-. The stand taken by the writ petitioner is that this being the subject matter of W.P.No.22434/99, the impugned order cannot be sustained and the same is liable to be quashed.

The 1st respondent filed a counter affidavit in detail and the stand taken by the 1st respondent is that the writ petitioner claimed the relief only on the part of the turnover of Rs.11,76,29,000/- which was added on reassessment and not on turnover made in the original assessment. Further, specific stand was taken that this Court in W.P.No.22434/99 did not set aside the turnover on assessment dated 6-9-1995.

A reply affidavit was filed again reiterating the same stand

taken in the affidavit filed in support of the writ petition.

Sri S.Krishna Murthy, the learned Counsel representing the writ petitioner would contend that there was neither a show cause notice nor a valid demand made by the 1st respondent and the 1st respondent being a quasi-judicial authority while making an assessment order is bound to follow the procedure and the impugned order is in violation of the principles of natural justice. The Counsel also would submit that the assessment of 1995 got itself merged with the subsequent assessment which was the subject matter of W.P.No.22434/99 and in view of the same, the remedy available to the 1st respondent would be to get the prior order reviewed and definitely not by making the present impugned order which may even amount to contempt of Court. The Counsel also would submit that in view of the facts and circumstances the prior assessment also would be nonest in the eye of law and even on the ground of non-application of mind the said order also cannot be sustained and hence the present impugned order is liable to be quashed.

Per contra the learned Government Pleader for Commercial Taxes had taken this Court through several averments made in detail in the counter affidavit filed by the 1st respondent and also the

averments made in the affidavit filed in support of the prior Writ Petition. The learned Counsel would contend that it is no doubt true that W.P.No.22434/99 was allowed, but on that simple ground alone it cannot be said that the present impugned order is contrary to the prior order made by this Court in W.P.No.22434/99 inasmuch as the original assessment order was not set aside and in view of the same the present order questioned in the Writ Petition cannot be found fault in any way since there is no illegality or any other legal infirmity in making the impugned order. Even otherwise, the learned Counsel would contend that no prejudice is caused to the Writ Petitioner and there is some delay in approaching this Court by invoking the jurisdiction of this Court under Article 226 of the Constitution of India.

The simple question which had been argued at length by both the Counsel is whether the present impugned order is contrary to or in conflict with the prior order made by this Court in W.P.No.22434/99 and whether the same is liable to be quashed on the said ground. No doubt certain incidental and ancillary questions had been canvassed by both the Counsel in support of their respective contentions to substantiate their respective stands in relation to the principle question referred to supra. It may be appropriate to have a look at the relief prayed for in W.P.No.22434/99

which is as hereunder :

> "For the reasons stated in the accompanying affidavit, the petitioner herein prays that this Hon'ble Court may be pleased to issue a writ or order or direction particularly one in the nature of writ of certiorari after calling for the records and quash the impugned order dated 20-10-1999 passed in R.C.No.1396/99-2000 in G.I.R.No.10396/92-93/CST by the first respondent or to pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case."

In the counter affidavit filed by the 1st respondent, at para-2, while narrating the details it was specifically pleaded as hereunder :

> " ……I respectfully submit that the petitioner-assessee for the year 1992-93 filed returns under the CST Act, disclosing a gross turnover of Rs.29,78,766/- and net turnover of Rs.22,20,711/-. The returns filed by the assessee were accepted by my predecessor in office then, and he accordingly passed assessment orders on 6-9-1995. The said order was served on the petitioner-assessee on 4-11-1995. Against this order, the petitioner did not file appeal and thereby allowed the assessment to become final. Similarly, the assessment of the petitioner for the year 1992-93 under the APGST Act was also completed by my predecessor on 6-9-95.
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> **While so, the Deputy Commissioner (CT) Abids, being the revisional authority under Section 20(2) of the APGST Act 1957 had revised the assessment orders of the petitioner on 26-2-96 for the year 1992-93 under the APGST Act, adding a turnover of Rs.11,76,29,000/- towards sales of Exim Scripts/REP.Licences which escaped assessment at the hands of assessing authority. Against the revision orders for the year 1992-93, the petitioner-dealer filed appeal before the Hon'ble Sales Tax Appellate Tribunal in T.A.No.413/96. The Hon'ble Sales Tax Appellate Tribunal remanded the matter on 6-4-99 to the assessing authority holding only a part of the above turnover i.e., Rs.8,87,59,000/- would be**

exigible to tax under the APGST Act and on the balance turnover Rs.2,88,70,000/-, the appeal was remanded as sales relating to outside the State sale was involved and for verification by the assessing authority whether it is taxable at the hands of petitioner-assessee.

It is submitted that my predecessor in office, however, passed reassessment orders for the assessment year 1992-93 under the CST Act on 20-10-1999 adding the turnover of entire sales of Exim Scripts of Rs.11,76,29,000/- to the turnover already reported by the petitioner-assessee through returns under the CST Act and accepted in the assessment order dt.6-9-95.

Against the assessment orders dt.20-10-99, the petitioner filed W.P.No.22434 of 1999 before this Hon'ble Court. In the affidavit filed in support of that Writ Petition, the petitioner claimed relief only on that part of the turnover of Rs.11,76,29,000/- which was added on re-assessment and the tax due thereon but not on the turnover made in the original assessment dt.6-9-95 relating to the sales of Ferric Oxide. This Hon'ble Court by an order dt.27-4-99 did not appreciate the action of my predecessor in passing the assessment order on 20-10-1999 adding the turnover of Rs.11,76,29,000/- relating to sales of Exim Scripts under the CST Act. Accordingly, by its order dt.27-1-99 allowed the Writ Petition and quashed the impugned assessment proceedings dt.20-10-1999 so far as the addition of turnover is concerned.

It is submitted that as the turnover relating to the sales of Ferric Oxide in the original assessment order dt.6-9-95 was also included in the impugned assessment order dt.20-10-99, a separate order was passed on 18-10-02 confirming the turnovers reported by the petitioner and accepted by the assessing authority in his assessment order dt.6-9-95.

By virtue of the orders of this Hon'ble High Court dt.27-12-99, the petitioner was given relief, deleting the turnover of Exim Scripts added in the re-assessment orders on 20-10-99, while restoring the turnover relating to the original assessment dt.6-9-95. By virtue of the assessment orders dt.18-10-02, no additional demand was raised against the petitioner causing prejudice to him."

From a careful reading of the order in W.P.No.22434/99 and the very

pleading of the writ petitioner it is clear that the original assessment of the year 1995 was not set aside, but however, the stand taken by the writ petitioner is that the prior order had merged with the subsequent assessment order which was the subject matter of W.P.No.22434/99 and hence when once the said assessment was quashed, the 1st respondent has no authority or jurisdiction to make the impugned proceedings. No doubt incidentally contentions regarding the non-issuance of show cause notice of demand etc., also had been canvassed. At this juncture it may be appropriate to have a look at the relevant portion of the order of this Court made in W.P.No.22434/99 dated 27-12-1999 wherein the Division Bench of this Court had stated :

> "….. A survey of the facts narrated above could reveal that the first respondent has completely forsaken his duty as a quasi-judicial authority, blatantly misconstrued the order of the Tribunal in T.A.No.413 of 1996 and clutched at the jurisdiction not vested in it to revise the assessment under CST Act on the basis of a non-existent directive of the Tribunal. The first respondent out-stepped his jurisdiction in projecting the very same turnover that was assessed under APGST Act into the CST assessment by reviewing the CST assessment order. The question of revision of assessment would only arise if any turnover had escaped assessment or had been subjected to lower rate of tax. The Tribunal's order in an appeal arising out of the APGST assessment does not even contain a whisper

or hint that any part of the turnover would attract tax under CST Act. By figment of imagination, the first respondent proceeded to revise the assessment under CST Act and the order of the Tribunal is used as a cloak to raise a fanciful demand for Rs.1.17 crores. It would be travesty of justice if the impugned assessment is allowed to stand. It is one of the extraordinary cases where we are called upon to exercise the jurisdiction under Article 226 of the Constitution to prevent further harassment to the assessee. It is not at all just and appropriate to relegate the petitioner to the remedy of appeal. In the result, the writ petition is allowed and the impugned order of the assessment is quashed…..".

While dealing with the meaning of the expression 'assessment' under Section 14 of the A.P. General Sales Tax Act, 1957, a Division Bench of this Court in K.MAHMOOD OSMAN SAHEB & CO. Vs. STATE OF A.P. [1] **held :**

"No doubt the word 'assessment' may have a comprehensive meaning and may some times mean the whole procedure laid down for imposing the tax or penalty. But the said expression must be interpreted with reference to the context in which it is used. Therefore, the expression assessment occurring in the last sentence of Section 14(1) of the A.P.General Sales Tax Act 1957 is only referable to the final order of assessment and not the whole proceedings for imposing the tax."

From an analysis of the factual position it is clear that the writ petitioner is in know of all the facts and also is conscious of the fact

that the original assessment had been left untouched by the subsequent judicial verdict. However, having kept quiet for a considerable length of time, the writ petitioner no doubt had invoked the jurisdiction of this Court under Article 226 of the Constitution of India questioning the impugned order. The principle ground of attack of the applicability of the concept of doctrine of merger had not been specifically pleaded by the writ petitioner though in paras 5 and 6 of the affidavit the prior order of the Division Bench of this Court in W.P.No.22434/99 dated 27-12-1999 had been referred to and a specific stand had been taken that the impugned assessment is contrary to the said order. I n KUBHAYAMMED Vs. STATE OF KERALA [2] **the Apex Court while dealing with the doctrine of merger had observed at paras 7 and 42 as hereunder:**

> **"The doctrine of merger is neither a doctrine of Constitutional law nor a doctrine statutorily recognized. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. On more occasions than one this Court had an opportunity of dealing with the doctrine of merger. It would be advisable to trace and set out the judicial opinion of this Court as it has progressed through the times.**
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> **"To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See *Corpus Juris Secundum,***

Vol.LVII, pp.1067-68).”

Except raising a vague ground of merger at the time of arguments without any factual foundation, the learned Counsel for the writ petitioner also was unable to substantiate how the several conditions or ingredients for applying the doctrine of merger are satisfied in the present case. The Apex Court had well discussed the pre-conditions for attracting the applicability of doctrine of merger in SUSHIL KUMAR SEN Vs. STATE OF BIHAR [3] **and** SHANKAR RAMCHANDRA ABHYANKAR Vs. KRISHNAJI DATTATREYA BAPAT [4]. **This question of applicability or otherwise of the doctrine of merger had been well discussed in a catena of decisions by the Apex Court:** COMMISSIONER OF INCOME TAX, BOMBAY Vs. AMRITLAL BHOGILAL AND CO. [5], STATE OF MADRAS Vs. MADURAI MILLS CO.LIMITED [6], GOJER BROS (PVT) LIMITED Vs. RATAN LAL SINGH [7] **a n d** S.S.RATHORE Vs. STATE OF MADHYA PRADESH [8]. **A Division Bench of this Court also had an occasion to deal with this aspect in** SPECIAL DEPUTY COLLECTOR Vs. VASUDEVA RAO [9]. **In the light of the specific stand taken in the counter affidavit by the 1st respondent and on a careful analysis of the impugned order and also the order made by this Court in**

W.P.No.22434/99 this Court is satisfied that the applicability of doctrine of merger cannot be stretched too far to an assessment of this nature especially in the light of the fact that the original assessment was left untouched by the prior judicial verdict and an interpretation that in the light of the above factual position the present order would be contrary to the prior order made by this Court would lead to absurdity. Apart from this aspect of the matter, this Court is thoroughly satisfied that absolutely no prejudice is caused to the writ petitioner by the present impugned order. Hence, for the reasons referred to above, this Court sees no valid reasons to interfere with the impugned order and accordingly the Writ Petition is dismissed as devoid of merits. No costs.

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Bilal Nazki.,J

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P.S.Narayana.,J

Date : -6-2004

L.R. copy to be marked : YES / NO

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[1] ILR 1972 A.P. 719 = 1970 APHN 357

[2] (2000) 6 SCC 359

[3] AIR 1975 S.C. 1185

[4] AIR 1970 S.C. 1 = (1969) 2 SCC 74

[5] AIR 1958 S.C. 868 = 1958(34) I.T.R. 150

[6] AIR 1967 S.C. 681 = 1967(19) STC 144

[7] AIR 1974 S.C. 1380 = 1974(2) SCC 453

[8] AIR 1990 S.C. 10 = 1989(4) SCC 582

[9] 2003(12) ILD 342